No. 12446

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

H. W. SMITH, d/b/a A-1 Photo Service,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S REPLY BRIEF.

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I.

The Board's Arguments Which Are Based on Budgetary Considerations Are Neither Relevant Nor Probative.

It would seem manifest that a statute enacted in 1935 and amended in 1947 cannot be construed by the amount of money available to the Board in 1950 or the amount of cases arising in the Board in 1950. As stated in *Parsons v. Herzog*, 85 Fed. Supp. 19 (D. C., D. C., 1949), reversed for lack of jurisdiction, 25 L. R. R. M. 2413 (C. A., D. C.):

> "The Court cannot subscribe to the defendants' [N. L. R. B.] position that the volume of cases which might arise under the statute, if it were construed in a certain light, would be such a prohibitive number as to influence the Court's ruling on the law. The Court must interpret the law as it is written, whether 3600 cases arise or 36,000 cases arise. In

other words, the number of cases which may or may not arise is not a factor which will influence the Court in its judgment."

Parsons v. Herzog, 85 Fed. Supp. 19, 20 (D. C., D. C., 1949).

Of course, if there are insufficient funds and employees to handle all cases, then it is physically impossible for the Board to handle all cases. No question of discretion would be involved in the cases which the Board would thus be unable to handle. It would only be a question of physical possibility. If the General Counsel spends more money than his budget allows, then he must account to the President or Congress, but the act of the General Counsel in going beyond his budgetary limits is no aid of statutory construction whatsoever. The question here relates to the "final authority" of the General Counsel in issuing complaints where jurisdiction admittedly exists. The answer to that question has nothing to do with the wiseness of the exercise of the General Counsel's discretion in picking his cases nor whether he has funds to cover the expense of prosecuting those which he picks. We are concerned with which of two agencies has the power of final discretion; we are not concerned with the wiseness of the exercise of the discretion by either of the agencies. Congress, of course, may be interested in the latter question.

Furthermore, the Board did not dismiss this case because it did not have money to adjudicate it. The Board's dismissal was upon the broad ground that it had discretion to determine from a purely policy standpoint what cases it desired to adjudicate. Physical ability dependent upon funds has nothing to do with policy, and the dismissal was not based upon such physical grounds.

The function of the reviewing court is to review the order of the Board in the light of the adequacy of the grounds given by the Board to support the order. Administrative law requires the Board to disclose the specific grounds upon which its order is based (*Phelps Dodge Corporation v. N. L. R. B.*, 313 U. S. 177). In stating the function of the reviewing court, the Supreme Court has held in *Securities Exchange Commission v. Chenery Corporation*, 318 U. S. 80, 87-88; 87 L. Ed. 626, 633:

> "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."
>
> *Securities Exchange Commission v. Chenery Corporation*, 318 U. S. 80, 87-88, 87 L. Ed. 626, 633.

This court cannot take judicial notice that as a matter of fact the Board does not have sufficient funds to determine all cases presented to it by the General Counsel. The court does not know the cost of processing each case or any particular number of cases. This consideration with respect to budgetary limits constitutes calling things to the court's attention which are outside the record and of which it cannot take judicial notice because of the nature of the facts. The Supreme Court has held that it is error for the reviewing court to consider facts so presented to it.

See:

> *N. L. R. B. v. Newport News Co.*, 308 U. S. 241, 249-250; 84 L. Ed. 219, 225.

The Board's argument also overlooks the point that the General Counsel holds office for only four years and that the next General Counsel, in the exercise of his discretion, may see fit to exercise his prosecuting func-

tion in far fewer cases than the Board desires to hear. In such case, of course, the Board would probably have a surplus of funds. This illustrates the fact of the irrelevance and nonprobative nature of the Board's argument in this connection.

II.

The Board Confuses the Questions of Jurisdiction in Fact and the Wiseness of the Exercise of Jurisdiction.

The Board in its Smith brief, page 4, admits that in the instant case the Board in fact had jurisdiction inasmuch as it found that petitioner was engaged in commerce within the meaning of the Act. Also, the Board has admitted this in an answer filed in this case to petitioner's Statement of Points. The Board also concedes in its Smith brief, page 5, that the issue relates to the claimed discretionary authority of the Board to dismiss a complaint issued by the General Counsel.

Despite the above admissions, the Board in its Smith brief, pages 35-36, and its Haleston brief, page 16, contends that the courts require it to determine in each case if the affect upon commerce would be *substantial* and that the justification of the exercise of the Board's power clearly appear (citing the *Consolidated Edison* case, Haleston brief, page 16, and the reference to "*substantial* obstructions" to commerce in Section 1 of the original Wagner Act). This admission of the Board and its subsequent arguments with respect to the necessity of substantiality of affect as applied in the Board's brief are

inconsistent. Here again the Board criticizes the wiseness of the General Counsel's choice of cases. We point out again that the wiseness of the General Counsel's exercise of discretion is not the issue, but only the question as to the finality of such exercise is at issue.

It is clear from reading *Consolidated Edison v. N. L. R. B.*, 305 U. S. 197 (Board's Haleston brief, page 16) that the court was speaking with reference to establishing legal jurisdiction or jurisdiction in fact, not to the exercise of existing jurisdiction. That case recognizes the distinction between the Board's power over businesses engaged in interstate commerce as such and those not engaged in interstate commerce but which perhaps have some affect upon interstate commerce. The court was only stating that as to the latter type of business the effect should be something more than *de minimus*. This becomes obvious in the light of the cases considered in petitioner's brief, pages 36, 39.

Attention should also be called in this connection to Section 1 of the Labor Management Relations Act of 1947 which amended the National Labor Relations Act. See petitioner's brief, appendix pages 1-2. This section does not mention the word "substantial." Rather it refers to the "normal flow of commerce," to "full production," to "promote the *full* flow of commerce," and three times to the term "affecting commerce" without quantitative description. Also the definition of commerce as contained in the Act (Pet. Br., Appx. 4) uses the term "affecting commerce" without quantitative limit.

The Board takes issue (Smith Br., p. 35) with the petitioner's statement in its brief, pages 38-39, that the reference to "substantial obstructions" in Section 1 of the Wagner Act refers to obstructions in general rather than those in the individual case. The Board itself has always contended to the same effect as petitioner that its jurisdiction is determined in the light of the affect which would occur were the unfair labor practices of the instant case applied generally throughout industry and relying for its position on the same case cited by petitioner.

See:

United Brotherhood of Carpenters and Joiners of America, 81 N. L. R. B. 802;

United Brotherhood of Carpenters and Joiners of America, 80 N. L. R. B. 533.

Furthermore, even if the exercise of the Board's power is limited to instances of substantial obstructions to commerce, then still the Board overlooks the point made by petitioner that the determination of the General Counsel as to whether the case is sufficiently worthy of prosecution is binding upon the Board. In other words, if the question must be determined, then it must be determined by the General Counsel, and his decision thereupon is final.

III.

The Board Does Not Have Its Claimed Discretion Under Sections 9 or 10 of the Act.

A. Section 9 of the Act; Representation Proceedings.

Throughout its Haleston brief the Board assumes that no one takes issue with its position that under Section 9 of the Act relating to representation proceedings it (the Board) has full and complete discretion to act or not act as its policy dictates and that in the application of such policy it is free to decline existing jurisdiction over local businesses. As stated in petitioner's brief in the instant case, this position of the Board is strenuously opposed (Br., pp. 34-35). Of course, the General Counsel has no authority under the Act to initiate or determine questions concerning representation. These are admittedly, so far as the Act is concerned, under the complete authority of the Board itself. Shortly after the enactment of the statute, however, the Board delegated this function to the General Counsel. While we admit the full authority of the Board, to the exclusion of the General Counsel, with respect to representation matters, we do not admit at all that in the exercise of its authority the Board has the discretion to act or not act as it sees fit. It is submitted that the language of the Act itself unambiguously requires the Board to entertain every question concerning representation and to make a determination thereof. The Board is instructed wherever it has *"reasonable cause"* to believe that a question of representation exists to determine such question. When contrasted with the same provision of the Wagner Act which simply provided that the Board "may" investigate such questions, it is clear that Congress intended to make a substantive change in the Board's discretion under Section 9. Indeed, the

Congressional Record is filled with attacks upon the Board for the manner of exercising its discretion under the Wagner Act. It had declined to determine questions of representation when raised by an employee or an employer. The A. F. of L. accused the Board of favoring the representation matters raised by the C. I. O., and Congress clearly determined that this type of proceeding must be forever removed from the Board's discretion and made mandatory upon it. The original bills of each House had similar mandatory provisions. The House Minority Report No. 245 on H. R. 3020, page 85, 80th Congress, 1st Session, itself underscored the word "shall" as it appeared in Section 9(c). The Senate Report No. 105 on S. 1126, page 10, 80th Congress, 1st Session, contains the criticism of the discriminatory policies of the Board in choosing the representation matters which it would resolve, stating that the intent of the Bill was to make it *necessary* for the Board to entertain employee and employer petitions as well. See also page 25 of the same document. The Conference Report No. 510 on H. R. 3020, page 50, 80th Congress, 1st Session, stated in this connection:

> "Both under the House bill and the Senate amendment if there was reasonable cause to believe that a question of representation affecting commerce existed a hearing was to be held. . . . Both the House bill and the Senate amendment provided that if the Board found upon the hearing that a question of representation existed a secret ballot should be held and the results thereof certified.
>
> "The conference agreement, in section 9(c), follows the provisions of the Senate amendment, most of which, as indicated, were also contained in the House bill."

Mr. Taft on the floor of the Senate summarized the criticisms which had been leveled at the Board's exercise of its discretions in these cases and stated that the Senate bill was intended to correct it, 93 Cong. Rec. 3954, April 23, 1947.

Also, Senator Morris stated in this connection:

> "If such petition is filed, the Board is *required* to investigate, and if it believes a question of representation has arisen, it *must* provide for a hearing and an election." (Emphasis added.)
>
> 93 Cong. Rec. 4799, May 7, 1947.

The above references to the Congressional history also show that the Board still has a function to perform in determining whether a question of representation actually exists. The term "question concerning representation" grew up as a word of art under the Wagner Act, and Congress intended that under the amended Act the legal definition of the term would continue. The Board had previously held that a question concerning representation did not exist unless the union seeking the election could make a *prima facie* showing (administratively) of substantial interest (30% by cards) of the employees in it as a representative. The Board also held that such a question did not exist where there was a valid collective agreement in existence with a substantial time to run prior to its expiration. These tests which determine whether a question of representation actually exists may still be applied by the Board. The Act is clear, however, that where under those tests the Board has "reasonable cause" to believe a question concerning representation exists, it *must* resolve such question by an election and hearing.

The construction of Section 9 urged here would not at all occasion "anomalous" results. If the Board were to obey the mandate of Section 9, no such situation would develop for it would act to resolve the question of representation wherever it had jurisdiction and a question concerning representation exists. Complete unity of operation would thereby be obtained because if there were any difference in the coverage of the Act as applied in the two types of proceedings, the coverage of representation proceedings would be the broader. That, of course, is as it should be since the determination of representatives generally precedes the application of the unfair labor practice sections of the Act.

The Board's argument in its Haleston brief, pages 40-41, that it would be discriminatory for it to have to prosecute under a complaint when it refused to act for the same party in a dispute concerning representation is without moment. Unions which fail to comply with Sections 9(f), (g) and (h) of the Act are not entitled to any benefits under the Act, but at the same time they are subject to all of the impediments and restrictions of the Act. Such is not an anomalous situation at all and if it involves discrimination it is the act of Congress and not of the Board.

B. Section 10 of the Act; Unfair Labor Practice Proceedings.

The Board cites many decisions under the old Act (most of them its own decisions) to the effect that the Board had discretion to dismiss complaints for policy reasons (Haleston Br., p. 12 *et seq.*). From this the Board contends in its Smith brief, page 26 *et seq.*, that it now has discretion to dismiss a complaint for the same

reason. This, of course, overlooks the fact that the Act has been substantially amended since the cases mentioned were decided. At that time the Board had final authority to issue complaints and its decision subsequently to dismiss its own complaint did not conflict with any principle of separation of powers. Since the 1947 amendments were intended to effect a full separation of powers, those cases are not in point, and citation of them actually begs the question. It is not necessary to so decide, however, because in each of those cases the policy leading the Board to dismiss was related to the merits of the case itself; see petitioner's brief, pages 54-55.

The Board's argument to support its claim of discretion under Section 10 of the Act (Smith Br., p. 26 *et seq.*) cannot be comprehended by petitioner. The Board insists upon confusing its discretion to effectuate the policies of the Act given to it under Section 10(c) with its claimed discretion to not act at all. Admittedly, the Board has a broad discretion in the framing of its relief so as to effectuate the policies of the Act, but that has nothing whatsoever to do with whether the Board has discretion to determine or not determine whether the policy of the Act has been contravened.

Attention should be called to the Board's statements throughout its brief that the dismissal in the instant case "effectuates the policies of the act." From that assumption the Board points to its broad discretion under Section 10(c) to so frame its order as to "effectuate the policies" of the Act, and thereby seeks to justify its dismissal order. The Board itself did not and could not decide that its order in this case was designed to effectuate the policies of the Act. It decided only that it would not

effectuate the policy of the Act if it exercised its decisional function, something entirely different, and something which would have been more correctly stated if the Board had said that it did not think the case worthy, for policy reasons, of prosecution. That choice of language would clearly have demonstrated that the Board was actually invading the exclusive province of the General Counsel, but the language used should not, because of its similarity to the language of Section 10(c) granting discretion to the Board in the framing of its order, be permitted to confuse the question or conceal the actual holding.

Of course, the Board does contend in its Smith brief, page 36, that the dismissal here does effectuate the policy of the Act by freeing the budget and personnel for more important cases. As discussed elsewhere in this brief, such a standard is neither relevant nor probative. Congress may be interested, but this Court cannot construe a statute by such means. On the Board's theory it would be free to decide that certain types of unfair labor practices, for "policy reasons," would not be determined by it, because it thereby frees its budget and personnel for other unfair labor practices which the Board feels are more important.

For an analysis of the extent of the Board's discretion and a discussion of the issue of this case, see note in 48 Michigan Law Review 1149.

IV.

The Board's Adjudicatory Function.

As stated in our brief, pages 5-6, the General Counsel in deciding to issue a complaint decides: (1) that there is probable cause to believe the existence of unfair labor practices, (2) that there is probable cause to believe the existence of jurisdiction, and (3) that the nature of the unfair labor practices and their affect upon commerce is sufficient to warrant the exercise of the Board's corrective jurisdiction. The Board contends (Smith Br., p. 20 *et seq.*), as we understand them, that there is no difference in the Board's eventual decision with respect to either of these three factors; that if the Board can decide contrary to the General Counsel on the first or second, then for the same reason it may decide contrary to the General Counsel on the third factor. The Board also contends, as we understand them, that with respect to the third factor the General Counsel only makes a probable cause decision rather than deciding the question definitively.

In our brief we did not mean that the Board could reverse the General Counsel on either the first or second factor. The Board decides whether the unfair labor practices and jurisdiction exist in fact. It is not interested in whether the General Counsel had probable cause to believe so. Therefore, the Board does not and cannot reverse the General Counsel on either the first or second factor. On these two factors the Board's analogy to an indictment is helpful, but the analogy ends there. So far as the General Counsel's decision on the third factor is concerned, the Board has no function with respect to it and can make no independent decision on it. This is so

because of the express provisions of Sections 3(d) and 10(c) of the Act. Section 10(c) states that when the matter gets to the Board it shall issue a corrective order or a dismissal depending upon its decision with respect to the existence or non-existence of unfair labor practices. This is mandatory in form and the Board is not given authority to make any other decision.

The Board is further prevented from deciding the third factor itself because such action is inconsistent with its nature as a *quasi-judicial* body as shown in petitioner's brief, pages 35-49. Such assumption of authority is clearly contradictory of the intent of Congress as shown in the legislative history (Pet. Br. pp. 17, 27) from which it is clear that Congress intended the General Counsel, not the Board, to determine what cases would be decided by the Board. In that connection the Board contends (footnote 35, page 24) that these statements refer to the General Counsel's authority to refuse to issue a complaint rather than to his authority in issuing a complaint. This, of course, is a distinction which even the Board itself in its present decision did not make [R. 55].

The Board assumes in its Smith brief (footnote page 16) that the petitioner has conceded that H. R. 3020 as passed by the House did not provide that the Administrator's action would be with final authority. The petitioner intended to make no such concession but stated only that the term "final authority" was not used in the House Bill. However, from the manner in which the House set up the office of the Administrator in H. R. 3020 (Pet. Br., Appx. 11-12) it is clear that the Administrator had such final authority. In the Conference Bill,

since the General Counsel's office was not physically severed from the body of the National Labor Relations Board, it was necessary to use the term "final authority" in order to make it clear that though not separated from the Board physically the General Counsel had the authority provided for the Administrator in H. R. 3020. (See excerpts from the Congressional History in Pet. Br., pp. 20-22.)

V.

The Board's Reliance on the Electrical Workers Case.

In its briefs the Board places great reliance on the case of *International Brotherhood of Electrical Workers v. N. L. R. B.*, 181 F. 2d 34 (C. A. 2), Haleston brief, page 41; Smith brief, page 31.

It is submitted that this case in no way supports the Board's position. The case involved a review of a Board order against a union conducted secondary boycott. The order required the union to cease and desist from such unfair labor practice. The union, in the court, attacked the Board's jurisdiction and also contends that the case was too trivial to justify the exercise of jurisdiction. The court doubts if it could ever determine whether the Board was justified in exercising jurisdiction so long as jurisdiction is possessed by it, and from that statement proceeds to a consideration of the merits of the case. The court gave no consideration whatsoever to whether the Board had any *discretion* in issuing the cease and desist order on the grounds contended for by the union. The division of authority between the General Counsel and the Board is likewise not mentioned. The court clearly did not have the question before it that is involved in the

instant case and obviously, therefore, the decision is no authority on the issue in the instant case. The Board contends in its Haleston brief that if the Board had no discretion in the matter, that that would have been the "short answer" to the union's contention. It would seem apparent, however, that the court gave the "short answer." Since it gave that answer, no assumption can be made as to what answer would have been given to the issue in this case if it had proceeded to its conclusion by that longer route.

VI.

The Legislative History Does Not Support the Board's Position.

On page 28 of its Haleston brief the Board quotes Senator Taft to the effect that the General Counsel in his action is subject to the decision of the Board and the courts. Senator Taft was no doubt referring to the General Counsel's decision with respect to whether the Act had been violated. This is obvious from his reference to the General Counsel being subject to the decisions of the court for as the Board itself so strenuously urges, the question of the exercise of discretion in seeing fit to prosecute or not to prosecute a case is not subject to court review. Likewise, the General Counsel's refusal to issue a complaint is manifestly not subject to court or Board review. (See cases cited in Pet. Br., pp. 11, 12.)

The Board also makes reference in its Haleston brief, page 29, to statements made in committee hearings in 1949 and again in 1950. These statements, none of which were called to the attention of Congress, are not any part of the legislative history of the National Labor Relations Act. Apart from this, however, these particular quota-

tions from Senator Taft were not intended to have the application attributed to them by the Board. The statement (Haleston Br., p. 29) made to Chairman Herzog to the effect that he could overrule the General Counsel came immediately after a discussion with respect to representation proceedings in which the authority of the General Counsel was based solely on a delegation of it to him by the Board. The statement that the Board would have the final word and that the General Counsel should follow the Board's declaration of policy are equally out of context. A careful reading will disclose that the statements refer to determining jurisdiction in fact, and were not directed at the issue in this case.

Senator Taft's actual opinion of the issue before this court is more properly stated on pages 23-24, Hearings Before the Senate Committee on Expenditures in the Executive Department on S. Resolution 248, 81st Congress, 2nd Session. Senator Taft was saying here that the General Counsel was construing jurisdiction in a manner broader than did the Board, and the following followed:

> "Senator Ives: Broader than it actually is?
>
> Senator Taft: I think so myself; yes, broader than it actually is. But I think there is one thing in which the Board is wrong. The Board has taken the position, in some cases, apparently, that merely because of size of the concern involved they are not going to interfere, and I think the Board is open to question on that. That will go to the courts, I assume. The General Counsel issues a complaint and you have all the litigation and then it will finally get to the Board and then a year later the Board says, 'No; that case ought never to have been brought because it is not in our jurisdiction.' "

While the last word of the above quotation might seem to indicate that Senator Taft was referring to jurisdiction in fact rather than the power to exercise discretion, it is clear that he actually had in mind this instant case. Otherwise he could not possibly have felt, if he understood the Board as saying they did not have jurisdiction in fact, that they were wrong in rejecting the case. For other relevant discussions by Senator Taft see pages 15-16, 18, 25 of the same document.

All of which is respectfully submitted.

Dated: September 5, 1950.

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